

OPD APPELLATE WINS - JANUARY TO APRIL 2009

The Appellate Section of the OPD had many important wins in the first third of this year.

COMPETENCY TO STAND TRIAL

Convictions reversed when the Appellate Division concluded that the record clearly and convincingly raises a bona fide doubt on whether defendant met the competency standards set forth in N.J.S.A. 2C:4-4. Defendant's courtroom conduct was so disruptive that he had to be gagged in order that the judge could advise him of his rights. The trial judge indicated that defendant's behavior had been a problem every time he appeared in court, and described defendant's conduct on the day before trial as the worst he had seen in a courtroom in the judge's seventeen years on the bench. Due to defendant's out of control behavior, that included his conduct in the courtroom as well as an assault upon a guard at the jail on the morning of his trial, defendant was tried in absentia. Indeed, the criminal conduct that forms the basis of the charges in this case strongly suggest a mental imbalance. When explaining that he thought defendant was competent to stand trial, defendant's trial counsel stated that defendant knew the purpose of the court, judge, and jury, and the difference between right and wrong. Notably, defense counsel did not state that defendant was able to participate in his defense. Defendant's conduct at the time of trial, the nature of the crimes, and the proffer of irrational defenses clearly and convincingly raise a bona fide doubt about defendant's competency to stand trial. (State v. Marcus Sanders, March 3, 2009; Michael C. Kazer, Designated Counsel)

CONFESSIONS AND OTHER STATEMENTS

Suppression of confession affirmed by the Appellate Division. The investigators did not scrupulously honor defendant's request for counsel and his invocation of his right to remain silent. The first five pages of the transcript reveal defendant's repeated attempts to discern why he was arrested, all of which were rebuffed by the investigators. After initially refusing to answer defendant's questions, the officers decided to leave the room and return with the actual warrant charging defendant with attempted murder. It was the detective who initiated a conversation with defendant by asking him if he knew who he was, and then reading defendant the charge as contained in the warrant. It seems clear that the strategy employed by the investigators was designed to provoke the response that actually occurred: defendant became agitated and asked what the case was about. The officers dangled the specter of defendant's prior invocation of his rights as an impediment to any further information, and recited for a second time the Miranda rights from the form card, this time securing defendant's answers and signature. The method used by the investigators to secure defendant's signature on the Miranda rights form, and to have him continue to talk to them, exceeded what was permissible. Defendant neither waived his right to silence nor re-initiated the conversation with police, therefore requiring suppression of his statement. (State v. Anthony Jones, January 2, 2009; Kevin Walker, A.D.P.D.)

DEFENDANT'S PRESENCE/ABSENCE

Convictions reversed by the New Jersey Supreme Court. Defendant was tried and convicted in absentia on a superseding indictment alleging six counts of aggravated assault and one count of

second-degree burglary. The initial indictment charged defendant only with second-degree burglary. Defendant absconded after his arraignment on the initial indictment but before he could be arraigned on the superseding indictment. Defendant's trial in absentia on the superseding indictment did not comply with Rule 3:16(b) because defendant was never arraigned on the superseding indictment and never waived -- in writing or orally on the record -- his right to be present at trial on that indictment. Therefore, no conviction arising from any of the additional charges contained in the superseding indictment can stand. Before a court can find that a 'defendant's conduct evidenc[es] a knowing, voluntary, and unjustified absence' from trial under Rule 3:16(b), a defendant first must receive actual notice of the charges contained in the indictment at an arraignment or some other court proceeding. See also **JURY INSTRUCTIONS**. (*State v. Angelo A. Greci, Jr.*, February 24, 2009; Ruth Bove Carlucci, A.D.P.D.)

EVIDENCE

Convictions reversed because of **violation of State v. Bankston**, 63 N.J. 263 (1973) in testimony by arresting officers and summation by prosecutor. Officer Dakin testified that he and his partner "received information that a Hispanic male named Orlando Arocho was leaving Nassau Street in New Brunswick, was going to Lawrence Street in New Brunswick with at least a brick of heroin which is equal to fifty bags, fifty individual bags." Officer Dakin's testimony was impermissible hearsay. Although Officer Dakin did not mention the confidential informant, stating that he and his partner "received information," he still testified specifically as to that "information." The impropriety of the testimony was magnified by the prosecutor's summation. The prosecutor's summation obscured the probity of the limiting instruction when he said: "Fiction is the name Orlando Arocho that the defendant gave to the police. But even that, there's a thread of truth in that because by giving police his name like he did, it corroborated[,] or matched up with[,] the information that the police had obtained earlier that night." In essence, the State argued that the "truth" of the informant's information corroborated what transpired when the officers confronted defendant. The logical implication of the officer's testimony, as explored on summation, was that a non-testifying witness supplied the police with evidence of defendant's guilt. (*State v. Edwin Aquino*, March 10, 2009; Kevin G. Byrnes, Designated Counsel)

Convictions reversed. The Appellate Division concluded that reversible error occurred with respect to rulings concerning **defendant's investigator, who was ordered to produce the notes of her interview with S.M., and whom the State was permitted to utilize as a rebuttal witness**. The notes included statements by the victim consistent with her accusation that defendant had molested her. The notes were privileged and that the order to disclose them undermined the effective assistance of counsel because it tended to chill investigatory efforts. In addition, the prosecution made improper insinuations in front of the jury that the defense had tried to "hide" information uncovered by the investigator. The prosecutor also improperly used the testimony of the defense investigator as if it were substantive evidence in her summation remarks. There was no compelling need on the prosecution's part to turn the defense investigator into a witness against the defendant during trial. Furthermore, during the redirect examination of the defense-retained investigator, the prosecutor sought to create an impression, not dispelled by the court, that the defense had been caught attempting to conceal information. At a minimum, the court should have given a curative instruction

that an interviewer is not required to write a report and that no sinister motive should be inferred from the failure of the investigator to have written a report. (State v. Sidney Atkins, March 3, 2009; Susan Brody, A.D.P.D.)

Appellate Division judgment reversing conviction affirmed by the New Jersey Supreme Court. In accordance with the Evidence Act of 1960, the Court codifies a **forfeiture-by-wrongdoing exception to the hearsay rule**, which will allow the admission of a witness's statement offered against a party who has engaged, directly or indirectly, in wrongdoing that was intended to, and did, procure the unavailability of the witness. However, the criminal convictions of the two defendants in this case must be reversed. First, the trial court introduced the statement of a witness, who allegedly was made unavailable by intimidation, at a time when there was no forfeiture-by-wrongdoing exception in our evidence rules. Second, even had there been a codified rule, the hearsay statements of the allegedly threatened witness would not have been admissible because the trial court examined the witness ex parte, outside the presence of defendants and their counsel, denying defendants their right of confrontation. Moreover, the court took testimony without placing the witness under oath and did not permit defendants the opportunity to present evidence to rebut the State's evidence of intimidation. (State v. Dione Byrd and Freddie Dean, Jr., April 2, 2009; Mark H. Friedman, A.D.P.D., for Dean)

Conviction reversed. The State agreed that the judge failed to issue the required limiting instruction for fresh complaint, maintained that the judge's error was harmless because L.C.'s hearsay testimony describing her conversation with her daughter would have been admissible in any event under **N.J.R.E. 607 and 803(a)(2) [admission of prior consistent statements to rebut claim of recent fabrication]**. The Appellate Division disagreed. Such a construction of these two evidence rules would--in all cases where the alleged victim's motive was attacked--entirely eviscerate the requirement that a limiting instruction be given. Attacks on the alleged victim's motives are presented in a significant number of child sexual assault prosecutions. To accept the State's contention that the fresh-complaint testimony here was admissible because of N.J.R.E. 607 and 803(a)(2)--even in the absence of a limiting instruction -- would essentially be creating two categories of sexual assault prosecutions. In one category, where the victim's motives are attacked, no limiting instruction would be required. In the second category, where the alleged victim's motives are not challenged, a limiting instruction would be required. the Court declined the State's invitation to parse the Bethune requirement of a limiting instruction in such a fashion. See also **JURY INSTRUCTIONS**. (State v. V.C., March 25, 2009; Stefan Van Jura, A.D.P.D.)

Convictions reversed because a State's witness displayed to the jury an eight-inch by ten-inch color **photograph in which defendant was wearing an orange prison suit**. The trial court noted, in denying defendant's motion for a new trial, that identification was not a significant issue in this case. But that factor, in the Appellate Division's judgment, made the display of this picture even more prejudicial. It contributed nothing to the trial of this matter other than to let the jury be aware of the fact that defendant had, in the past, been incarcerated. There was no physical evidence of defendant's involvement in this crime. The only real evidence against him was the testimony of Bethune, who had negotiated a very favorable plea bargain for himself in exchange for his testimony at defendant's trial. See also **PROSECUTORIAL MISCONDUCT**. (State v. Daniel Gatson, February 26, 2009;

Stephen W. Kirsch, A.D.P.D.)

Conviction reversed by the Appellate Division because of the development of **repetitive testimony by the State of what must have been understood by the jury as defendant's propensity to commit crime**. There was repeated testimony that defendant had shouted during the chase and struggle leading up to his arrest that he did not want to go back to jail. Defendant did not testify and his convictions were not used to impeach him. The unsanitized and repeated references to defendant's desire not to return to jail must be understood as meaning he had previously been there, and this is particularly true as a result of the inference which flowed from the arresting officer's recognition of defendant, his reaction to being observed by her, and the fact she pursued him alone among the group of people leaving the store. No required limiting instruction was given here with respect to the use of such evidence. The repeated unsanitized references clearly related to incarceration for other crimes as well as res gestae, and the jury should have been properly guided as to the use of the evidence. (State v. Robert Lichtenberger, February 5, 2009; Kevin G. Byrnes, Designated Counsel)

Reversal of defendant's conviction by Appellate Division affirmed as modified by the New Jersey Supreme Court. Though polygraph evidence is generally inadmissible, defendant, without counsel, signed a stipulation before submitting to the exam in which he not only agreed to take the test but also (1) agreed that the polygraph examiner was an expert at his craft, (2) waived any objection to the admissibility of the expert's testimony, (3) waived the right to call another expert or witness about that evidence, and (4) agreed that the results of the polygraph exam would be admissible at trial. Those decisions would ordinarily have been made with the help of a lawyer. The sweeping waiver of trial rights in this case, without the assistance of a lawyer, compromises the integrity of the criminal trial process. Our obligation to advance the sound administration of justice, and our continuing doubts about the reliability of polygraph evidence, warrant the exercise of the Court's supervisory authority to **bar the admission of polygraph evidence based on stipulations entered into without counsel**.

In addition, the Court held that **false allegations made after the underlying accusation may also be relevant for impeachment purposes**. The law recognizes that a witness's prior false criminal allegations may be relevant to the witness's credibility. That logic applies with equal force to false criminal allegations made soon after the primary allegation. A false accusation after an event, if closer in time, can be even more probative than a prior false allegation. (State v. A.O., March 4, 2009; Michael J. Confusione, Designated Counsel)

Conviction reversed by the Appellate Division based on State v. Rahman Reeds, ___ N.J. ___, ___ (2009) (slip op. at 27-28). At trial, the State presented an expert in the area of narcotics distribution and possession. In response to a hypothetical question, the expert opined that in circumstances such as these all three occupants of the car constructively possessed the CDS. (State v. Issac Outen, February 18, 2009; Stephen P. Hunter, A.D.P.D.)

Conviction reversed by the New Jersey Supreme Court because the State's expert on drug possession and distribution methods went too far and **exceeded permissible limits by opin[ing] that defendant had been in "constructive possession" of drugs recovered from the car in which**

he was driving. Police stopped a car transporting a large quantity of heroin -- sixteen bricks -- into the state allegedly for purposes of distribution, not just for personal possession and use. The trial and appellate courts reasonably determined that jurors might not be familiar with the common practices used by those in the drug distribution trade when acquiring and transporting drugs for distribution. However, by mimicking the language of the statute, and positing on the pivotal legal element, the expert's testimony on constructive possession of drugs found in the vehicle did not constitute probative, helpful testimony for the jury. Rather, the expert's constructive possession opinion was tantamount to a legal conclusion, resulting in a veritable pronouncement of guilt on the two possession crimes for which defendant was charged, which clearly was unduly prejudicial. (State v. Rahmann Reeds, January 22, 2009; Alison S. Perrone, Designated Counsel)

Convictions reversed by the Appellate Division because of the admission of an **extraordinary amount of unduly prejudicial evidence, including prior bad act evidence**, denied him a fair trial. Evidence that defendant may have in fact written other stolen checks besides those in the indictment tarnished him with evidence of alleged crimes for which he was not on trial. While the judge recognized that such evidence fell within the purview of N.J.R.E. 404(b), he never applied the correct criteria during the Rule 104(a) hearing to determine if such evidence was admissible. Instead, the judge simply agreed to give the jury a limiting instruction. We agree with defendant that the admission of this evidence left the jury with the unmistakable impression that defendant had not only forged and passed one bad check, but had also engaged in numerous similar acts. If the State sought to introduce such evidence, the State should have indicted defendant accordingly. Having failed to do so, the State should not have sought to admit this evidence, and the court should not have permitted the State to do so. [B]y the time the State finished presenting its case, it had charged defendant not only with the two counts for which defendant was indicted, but the State had suggested that defendant was guilty of crimes in Maryland and California as well, that defendant had not only forged and uttered the one check but had committed the crimes of identity theft against not only Ressel but also against Duncan. (State v. Alfred Augusta Smith, January 2, 2009; Karen E. Truncale, A.D.P.D.)

Convictions reversed by the Appellate Division because the judge **erred by permitting, without a limiting instruction, multiple references to defendant's involvement with the Bloods street gang**. The State specifically argued during the pretrial motion that gang membership was pertinent to the conspiracy count. Yet, the State did not link defendant and Johnson together as Bloods or tie the alleged plan to kill Alston to their gang affiliation. Instead, the State theorized that defendant and Johnson conspired to murder Alston over drug territory. In support of that theory, the prosecutor elicited testimony regarding Johnson's drug dealing and how Alston was moving into Johnson's territory. The State did not, however, demonstrate any connection between defendant's and Johnson's affiliation with the Bloods and the drive-by shooting or murder. Because the prosecution's references to defendant's gang affiliation, as presented, were not linked to any element of the crimes charged, those references served no other purpose than to unfairly prejudice defendant. Evidence that defendant and Johnson were members of the Bloods was not necessary to support the conspiracy charge. The conspiracy theory rested upon a dispute over drug territory and the evidence did not tie that dispute to a conflict between gangs about that subject. Defendant did not dispute his friendship with Johnson, which was also established by other, non-gang-related evidence in the record. Moreover, as previously noted, the prosecutor made no attempt to link defendant and Johnson

together as Bloods, or to show that the crimes charged were gang-related. (State v. Samuel Sparks, April 20, 2009; Ronald C. Appleby, Designated Counsel)

GUARDIANSHIP/TERMINATION OF PARENTAL RIGHTS

“For the following reasons, we [the Appellate Division] hold as to S.A.: (1) that her due process rights were violated by a lack of sufficient notice of the State's intention to seek a finding of aggravated circumstances; (2) that the court erred in finding aggravated circumstances of abuse because she did not use excessive corporal punishment on the children and J.A.'s actions cannot be imputed to her; and (3) that DYFS did not prove the four statutory elements of N.J.S.A. 30:4C-15.1(a) by clear and convincing evidence. Therefore, we reverse the finding of aggravated circumstances of abuse and would require DYFS to make reasonable efforts to reunite her with her children. We also reverse the judgment of termination of S.A.'s parental rights and dismiss the guardianship complaint as to her. As to J.A., we hold: (1) that his due process rights were violated by a lack of sufficient notice of the State's intention to seek a finding of aggravated circumstances; (2) that the trial court abused its discretion in refusing to allow a bonding evaluation between J.A. and the children; and (3) that DYFS did not prove the four statutory elements of N.J.S.A. 30:4C-15.1(a) by clear and convincing evidence, because the trial court did not have adequate information to make a determination under the fourth prong of the best interests test. Therefore, we remand for J.A. to prepare a meaningful defense and present evidence at a hearing to determine if aggravated circumstances of abuse exist, and also remand on the issue of the termination of J.A.'s parental rights, in order for the trial court to consider evidence of the bond between J.A. and the children as well as evidence of the bond amongst the children themselves.” (DYFS v. S.A. and J.A., April 9, 2009; Janet A. Allegro, Designated Counsel, for S.A.; Laura M. Kalik, Designated Counsel, for J.A.; Noel C. Devlin, A.D.P.D., Law Guardian)

J.F. is entitled to an order declaring that no judgment of abuse/neglect has been entered against her. The Appellate Division reversed the fact finding order for two independent reasons: (1) there was insufficient evidence to find abuse or neglect; and (2) the procedures for entering a suspended judgment were not followed. Because there was no medical evidence indicating J.T. Jr. suffered from any injury at or following his birth attributable to J.F.'s drug use while pregnant with him, J.F.'s admitted drug use, by itself, provided an insufficient basis for a finding of abuse/neglect. The other problem with the factual basis set out in J.F.'s stipulation was that it assumes that an unborn child is a "child" for purposes of New Jersey's abuse/neglect statutes. The statutory scheme contemplates its application to children who have actually been born rather than to unborn children. (DYFS v. J.F./Matter of G.F., J.T. and M.T., March 3, 2009; Laura M. Kalik, Designated Counsel; Aleli M. Clemente-Crawford, A.D.P.D., Law Guardian)

Order terminating parental rights of A.E.M. reversed, case remanded. DYFS did not prove each of the statutory prongs for termination by clear and convincing evidence where defendant did not miss a court date for over two years, consistently complied with all services provided by DYFS, and consistently took advantage of visitation. The delay in the provision of services by DYFS, a temporary lack of shelter, does not qualify as harm to the child, defendant's criminal conviction did not indicate that reunification was not in the child's best interests, and the fact that he had not had

sufficient time in therapy to deal with his anger issues was not an impediment to reunification. (DYFS v. A.E.M./Matter of I.M.M., March 18, 2009; Christine B. Mowrey, Designated Counsel, for A.E.M.; Christopher A. Huling, A.D.P.D., Law Guardian)

In this Title Nine abuse and neglect proceeding, the mother and father were divorced and shared joint legal custody of their two children, but the mother had primary physical custody. As a result of an altercation between the mother and the thirteen-year-old daughter, [DYFS] filed an abuse and neglect complaint. The trial court awarded the Division custody and control of the children, and the children subsequently were placed with their father in Florida. Following a finding of abuse and neglect at the fact-finding hearing, the trial court continued the temporary placement with the father and ordered the Division to provide services to the mother. After multiple case management conferences, but without a final dispositional hearing, the trial court granted the Division's motion to dismiss the proceeding. The court advised the mother that she could seek any custody or parenting time modification through a matrimonial action. On appeal, the Appellate Division reversed and remanded for a full evidentiary custody hearing, applying the best interests of the children standard. The Supreme Court held that the statutory framework of Title Nine provides that upon a finding of abuse and neglect, the offending parent or guardian is entitled to a dispositional hearing to determine whether the children may safely return to his or her custody, and if not, what the proper disposition should be. (DYFS v. G.M. and M.M./ In the Matter of K.M. and C.M., April 7, 2009; T. Gary Mitchell, D.P.D., for G.M.; Phyllis G. Warren, A.D.P.D., for K.M. and C.M.)

Termination of parental rights reversed because the record did not support the judge's findings that K.M. is unwilling or unable to eliminate the harm to J.J. DYFS also did not meet its burden of proving that termination will not do more harm than good. In reaching this conclusion, the Appellate Division focused on four facts that were established by the evidence. First, as J.J. grows older, her special needs require less maternal scrutiny. Second, K.M. is making good progress. Third, J.J., who is old enough to express her views, wants to be with her mother. Fourth, J.J. was placed with her foster parents at an age when there was no significant bonding, such that termination of the relationship with the foster family would not cause more harm than good. The trial judge, although ordering termination of the parental relationship, nevertheless expressed the view that continued contact, by way of visitation with K.M., would be very beneficial to J.J. (DYFS v. K.M./Matter of J.J., March 24, 2009; Olivia Belfatto Crisp, A.D.P.D., Law Guardian)

The Appellate Division affirmed the termination of parental rights with respect to the biological mother, M.M., but vacated as to the biological father M.S., and remanded for further proceedings. Before he is permanently ruled out as a viable parent, M.S. deserves further consideration by the Division and by the trial court, with more expansive proofs that include a defense expert's testimony and updated bonding evaluations. Unlike M.S., M.M. was provided more than ample pretrial services by the Division, and she failed to take sufficient advantage of those services. More importantly, unlike M.S., M.M. did have a fair chance to litigate the guardianship trial with testimony from her defense expert. (DYFS v. M.S. and M.M./Matter of K.S., O.S., and K.S., April 23, 2009; Clara S. Licate, Designated Counsel for M.S.; Chanima K. Odoms, Designated Counsel for M.M.; Christopher A. Huling, A.D.P.D., Law Guardian)

Order dismissing Title 9 protective services litigation filed by DYFS and transferring physical custody from S.P. to P.P. reversed by the Appellate Division because it was entered without an evidentiary hearing. By not conducting a plenary hearing, the judge missed the opportunity to conduct an in camera interview of eleven year-old T.P., who consistently expressed her desire to be reunited with her mother. Although T.P.'s wishes regarding custody would not have been controlling or dispositive, she was certainly in a position to provide relevant and current information to the court. Additionally, at the time the court dismissed the Title 9 proceedings, no current reports were introduced in evidence to refute S.P.'s description of her progress in treatment, nor did DYFS present anything to refute S.P.'s contention that she had regained the ability to care for her daughter. Moreover, the court dismissed the Title 9 litigation without making any findings of fact or conclusions of law. When combined with evidence in the record showing that this was not the clear-cut case that would warrant the transfer of residential custody without a hearing, a remand for a plenary hearing is necessary. The record establishes that S.P. had made considerable progress in overcoming her addiction and maintaining stability. (DYFS v. S.P. and P.P./In the Matter of T.P., January 16, 2009; Phyllis G. Warren, A.D.P.D., Law Guardian)

Denial of termination of parental rights and motion for reconsideration by DYFS affirmed. A comparative bonding evaluation of the child with his or her natural parents and foster parents is almost always necessary even when DYFS satisfies the second prong of the "best interests" test for termination of parental rights, and was necessary in this case. If reunification is unduly delayed, the Family Part can appoint a professional to oversee the reunification process. (DYFS v. A.R./Matter of C.S., Jr., March 4, 2009; Sarah L. Monaghan, Designated Counsel, for A.R.; Christopher A. Huling, A.D.P.D., Law Guardian)

GUILTY PLEAS

Conviction reversed, case remanded for further proceedings by the New Jersey Supreme Court. Although there was an ample basis for the trial court's finding that Slater entered his guilty plea knowingly and voluntarily, and that his on-the-record statements during the plea colloquy also established an adequate factual basis for the plea, those facts do not end the inquiry. In evaluating motions to withdraw a guilty plea, trial courts should consider the following factors: (1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused. Slater's pre-sentence motion to withdraw his plea was rejected as a "change of mind" and went largely unexplored. On balancing the above factors, the Court found that Slater met his burden and was entitled to withdraw his guilty plea in the interests of justice. (State v. Tony L. Slater, February 4, 2009; Raquel Y. Bristol, A.D.P.D.)

INEFFECTIVE ASSISTANCE OF COUNSEL (IAC)

Denial of PCR reversed by the Appellate Division, case remanded for holding of a Wade hearing. The Court concluded that the record revealed substantial evidence of a deprivation of the effective assistance of counsel in this regard. Despite the inherent suggestiveness of the showup that occurred here, defense counsel simply failed to seek a Wade hearing and did not contest the

admissibility of that out-of-court identification. Just as one would expect a doctor, during a routine physical, to listen to the patient's heart with a stethoscope or take a reading of the patient's blood pressure, so too should the demands of our profession require that, in the circumstances presented here, an attorney seek the suppression of an identification that resulted from what is unquestionably an inherently suggestive showup. Should the trial judge determine that the showup identification should have been suppressed, the trial judge should then determine how that identification may have tainted other identification evidence or whether any of the other identification evidence would have been admissible absent the evidence of the showup identification. Defendant's right to a new trial will turn on the judge's resolution of these issues. (State v. Joseph Aruanno, April 21, 2009; Arthur J. Owens, Designated Counsel)

The Appellate Division noted that the trial court did charge the jury on attempt to commit a robbery, but the verdict sheet did not provide for the jury to find defendant guilty of attempt or second degree robbery. The Court was satisfied that in light of the evidence on which the jury found defendant guilty, defendant demonstrated a prima facie case for ineffective assistance of counsel. Accordingly, it remanded for a hearing to determine whether trial counsel made a strategic decision not to request the inclusion of attempt or second degree robbery on the verdict sheet. (State v. John Howard, April 9, 2009; Karen A. Lodeserto, Designated Counsel)

Denial of PCR affirmed in part, reversed in part, remand ordered to explore trial counsel's failure to correct the prosecutor's representation that the victim sustained two gunshot wounds. During the plea colloquy, defendant indicated that he was aware the victim was shot in the chest during the struggle for the gun but disputed the second gunshot to the victim's head. The autopsy report unequivocally stated that the victim was shot once in the chest. Defense counsel's failure to clarify the record and note the results of the autopsy report left the court with the misapprehension that defendant inflicted two gunshot wounds to the decedent, one to the chest and one to the head. At sentencing, the court did, in fact, consider the two gunshots and defense counsel again failed to present the autopsy report and correct the record. Defense counsel's failure in this regard an evidentiary hearing limited to a determination of whether defense counsel was ineffective in failing to bring the autopsy report to the court's attention and whether that failure adversely affected defendant's sentence. Appellate counsel may also have been ineffective during sentence appeal by not raising the discrepancy in the number of gunshot wounds to the victim and its effect on his sentence. If the court finds that defendant's sentence was adversely affected by trial and appellate counsel's failure to clarify the number of gunshots, the court should resentence defendant accordingly. (State v. Girbron Parson, March 27, 2009; Robert Carter Pierce, Designated Counsel)

Denial of PCR reversed by the Appellate Division, case remanded for new evidentiary hearing on defendant's claim that his trial counsel was ineffective because the surviving victim was found by the hospital to have barbiturates, benzodiazepines, and opiates in her blood at the time of admission. Defendant asserts that his counsel was ineffective in failing to bring this important distinction to the attention of the court and in failing to subpoena the hospital records. Defendant made out a prima facie case of ineffective assistance of counsel sufficient to require that an evidentiary hearing be conducted to explore defendant's claim. The PCR judge summarily concluded that counsel's failure to pursue inquiry into the surviving victim's drug use on the day of the murder and to retain an expert

with respect thereto was "certainly not grounds under those compelling uncontroverted facts in the case to cause a new trial with this defendant." Yet, the facts were "uncontroverted" because counsel failed to make such an inquiry and retain an expert. The PCR judge's 'common sense' conclusion that the surviving victim could not have been under the influence of drugs at the time of the murder because "she was clearly able to make identifications of the salient facts of the case" was insupportable. Thus, a hearing is required. Because the PCR judge seemed committed to the outcome of the trial based on his comments in reconstructing the record, the matter should be assigned to another judge on remand. (State v. Alshamoon Thompson, February 6, 2009; Michael Confusione, Designated Counsel)

Denial of PCR reversed, case remanded for evidentiary hearing. The trial transcript, viewed in the light most favorable to defendant, established that there was a witness who would have testified that Caraballo admitted he shot Figueroa. That testimony, if believed, could have lent some credibility to defendant's statement inculpatory Caraballo and exculpatory himself, or put the testimony of defendant's alibi witness in a different light. On this record the trial court had no basis for concluding that defense counsel made a tactical decision not to call Martinez to testify. All that can be gleaned from the record is that counsel abandoned a plan to call an available witness who had information useful to the defense. A hearing on counsel's reasons for that decision is required. (State v. Marcus Vargas, March 10, 2009; Steven M. Gilson, Designated Counsel)

JURY INSTRUCTIONS

Conviction reversed by the Appellate Division because of the judge's failure to issue a limiting instruction concerning the **fresh-complaint testimony** of L.C. denied defendant a fair trial. In particular, the trial judge's charge: 1) omitted a limiting instruction at the time of L.C.'s testimony, explaining that such fresh-complaint testimony could not be used as substantive evidence to establish that defendant had committed the offenses in question; 2) failing to so charge the jury during the final instructions; and 3) failing to confine the fresh-complaint testimony to that which was minimally necessary to identify the conduct in question. Here, the judge did not issue the limiting instruction required, nor did the judge limit the testimony to that which was "minimally necessary" to identify the subject matter of the complaint. Plain error not harmless because the victim's allegations were not directly supported by any other evidence. See also **EVIDENCE**. (State v. V.C., March 25, 2009; Stefan Van Jura, A.D.P.D.)

Denial of PCR reversed, case remanded for further proceedings by the Appellate Division. The indictment returned against defendant ... specifically recited that defendant was charged under N.J.S.A. 2C:13-1(b)(1). The indictment did not mention any other portion of N.J.S.A. 2C:13-1(b). The trial court erroneously included in its charge kidnapping under N.J.S.A. 2C:13-1(b)(2), although defendant had never been indicted under that section of the statute. The trial court told the jury that defendant would be guilty of kidnapping if the State had proven either prong beyond a reasonable doubt. The trial court did not tell the jury that it had to decide unanimously on which theory they found defendant guilty. The verdict sheet, moreover, simply asked the jury whether defendant was guilty of the crime of kidnapping in the first degree and did not inquire as to the basis of the finding of guilt. Defendant's attorney made no objection to this charge. (State v. Carl Esperance, April 30,

2009; Mark Zavotsky, Designated Counsel)

Conviction for possession of CDS with intent to distribute in a school zone reversed because in charging the jury the trial judge **failed to instruct the proper use of the school zone map**. A properly authenticated map accompanied by a municipal ordinance creates a presumption that the notice of the property was a school under N.J.S.A. 2C:35-7. However, in a criminal case a statutory presumption is permissive and is only an evidentiary device enabling jurors to draw or reject the conclusion sought by the prosecution. Accordingly, when there is reliance on the statutory presumption created by the municipal map, the jury must be instructed that the statutory presumption does not have substantive effect but presents an inference which may or may not be drawn by the jury to find the ultimate fact that the school was used for school purposes on the date in question. Furthermore, when defendant asserts that the State did not prove that a **reasonable person would know that the property was actually used as school property** at the time of the offense, the jury must be told that it is an issue and be provided with a proper instruction on the issue. (State v. Kareem Goines, March 2, 2009; Kevin G. Byrnes, Designated Counsel)

Convictions reversed by the New Jersey Supreme Court. The jury instruction on **burglary** specifically advised the jury that, in the cases of defendant and co-defendant Germann, both of whom were being tried in absentia, one element of burglary had been proven -- that "they [had] **entered [Piazza's apartment] without license or privilege**". The court's instructions in this case directed the jury to find that defendant was not licensed or privileged to enter Piazza's apartment. Regardless of how seemingly overwhelming the proofs were against defendant on that issue, it was for the jury, not the judge, to decide. Additionally, the court's re-charge on the elements of burglary -- in response to a jury request -- did not ameliorate its earlier flawed instruction. See also **DEFENDANT'S PRESENCE/ABSENCE**. (State v. Angelo A. Grenci, Jr., February 24, 2009; Ruth Bove Carlucci, A.D.P.D.)

Because the trial court's misstatement of the facts in its jury instruction as to defendant's **entrapment** defense was plain error, the Appellate Division reversed defendant's conviction and remand for a new trial. Defendant did not object to the charge; however, the State conceded that the court misstated the facts in evidence, as there was no evidence that defendant entered the apartment with the black bag, containing cocaine, in his possession. Whether defendant was in possession of the cocaine was a crucial element of the crimes charged. The jury instruction mischaracterized the evidence and, as defendant argues, essentially informed the jury that when defendant appeared at the apartment he was in possession of, and prepared to distribute, the cocaine in the bag. The court's instruction substantially and improperly bolstered the State's case. (State v. Victor Hoagland, March 6, 2009; Ingrid A. Enriquez, Designated Counsel)

POST-CONVICTION RELIEF (PCR)

Denial of PCR petition reversed, case remanded for further proceedings by the Appellate Division. Defendant showed "excusable neglect" for failure to file PCR petition within time limits of R. 3:22-12 because there was no evidential support to sustain defendant's guilty plea to the crime of first-degree robbery by causing the victim serious bodily injury, thereby mandating that defendant

serve a minimum of eighty-five percent of his fourteen-year sentence before being eligible for parole. The stipulation entered into by defendant here cannot be given binding effect because it was not grounded on competent evidence. The medical evidence produced by the State in discovery shows that, in the course of committing a theft, defendant did not inflict serious bodily injury upon the victim. Defendant's stipulation that the victim of his attack sustained "serious bodily injury" was merely his lay opinion, unsupported by competent evidence. As such, it cannot be given preclusive effect as a matter of law. Because defendant made a prima facie showing that his trial counsel was ineffective by permitting him to stipulate that the victim had sustained "serious bodily injury" within the meaning of the pre-2001 NERA statute, the Court remanded this matter for the trial court to conduct an evidentiary hearing in which defendant can expand upon the evidence presented here. The State would also have the opportunity to challenge this evidence, and supplement the record with any relevant discovery materials given to defense counsel at the time of the plea hearing, but not included in the appellate record. (State v. William Norman, February 4, 2009; Michael Confusione, Designated Counsel)

Denial of PCR reversed, case remanded for further proceedings by the Appellate Division. Where defendant had sought to raise his ineffective assistance of counsel claims as part of his direct appeal heard on the Excessive Sentence Oral Argument calendar, but the appellate panel declined to address them because they involved matters outside the record and instead preserved defendant's right to file a PCR petition concerning the issues, the trial court's denial of his motion for post-conviction relief as barred by R. 3:22-3 is reversed. The trial court also erred in denying the motion on the basis that defendant had failed to present a prima facie case of ineffective assistance as defendant should have been given additional time to obtain an expert report in the possession of the former attorney and to produce a witness in support of his contentions. (State v. Brandon Parker, February 17, 2009; Timothy P. Reilly, Designated Counsel)

PRE-TRIAL INTERVENTION (PTI)

State v. Sherri L. Copeland, unpublished opinion, App. Div. Docket No. A-0814-07T4 (March 3, 2009) -- Termination from PTI reversed, case remanded for further proceedings. The judge must expressly address the reasons supporting termination based on a drug test taken before he decided to give her another chance. In his opinion the judge referred to the fact that on January 9, 2007, "defendant was placed under oath and questioned by the Court and as part of her testimony she indicated that she had last used cocaine on October 2006." Although defendant admitted in March that she so testified "under oath," on January 9th, she was not placed under oath at that hearing. It may well be that perjury would make defendant a poor risk for rehabilitation, but the judge must provide adequate reasons to terminate defendant other than for abusing drugs before he gave her another chance to remain in the program. (State v. Sherri L. Copeland, March 3, 2009; Diane Toscano, A.D.P.D.)

Denial of admission to PTI reversed, case remanded for further proceedings to decide the question of whether defendant actually owed arrears or whether, due to miscalculation of his basic child support amount, Probation had failed to credit him with making the payments. Further, defendant's good faith was in issue. If defendant's testimony was credible, he had not willfully failed

to pay. Rather, he had not paid the lump sum due at the end of the three years because there was a substantial issue as to the correct amount. The State was unprepared to address that issue, because it produced a witness who was completely unfamiliar with the rudiments of child support much less with the specifics of defendant's file. The result was a miscarriage of justice. The judge mistakenly believed that he had no discretion to decide whether or not to dismiss defendant from PTI, and the State did not present enough evidence to permit the judge to exercise that discretion. Further, if defendant in fact did not make the full lump sum payment because of a good faith issue as to the amount, he should be given a reasonable opportunity to pay the lump sum once the amount is settled. (State v. Todd R. Ketterman, April 7, 2009; Michael B. Jones, A.D.P.D.)

PROSECUTORIAL MISCONDUCT

Reversible plain error committed when prosecutor argued in summation that the co-defendant who pleaded guilty and testified for the State should be believed because "as I told you, when he goes to prison, he may be followed by the person who he has implicated." The Appellate Division rejected the State's assertion that these remarks were "innocuous." There was absolutely no basis to imply to this jury that defendant and Bethune might end up incarcerated in the same institution. These remarks, moreover, carried the clear inference that defendant was capable of seeking violent retribution against Bethune if the opportunity presented itself. See also **EVIDENCE**. (State v. Daniel Gatson, February 26, 2009; Stephen W. Kirsch, A.D.P.D.)

SEARCH AND SEIZURE

In this opinion, the New Jersey Supreme Court reaffirmed longstanding precedent that permits an **automobile search without a warrant only in cases in which the police have both probable cause to believe that the vehicle contains evidence and exigent circumstances** that would justify dispensing with the warrant requirement. The question of whether exigent circumstances exist is to be determined, as it has always been, on a case-by-case basis with the focus on police safety and preservation of evidence. For purposes of a warrantless search, exigent circumstances are present when law enforcement officers do not have sufficient time to obtain any form of warrant. The Court also held that a warrant obtained by telephonic or electronic means is the analytical equivalent of an in-person warrant and should be treated accordingly. (State v. Juan Pena-Flores, et. al./State v. Charles Fuller, February 25, 2009; Stephen W. Kirsch, A.D.P.D., for amicus curiae Public Defender)

Conviction reversed, case remanded, suppression ordered. **Anonymous tip did not provide reasonable suspicion** for stop and frisk. The anonymous tip was substantially inaccurate. It referred to a suspect in a black jacket with a gun. Defendant was wearing a red jacket and was not in possession of a gun. The informant or tipster never said the gun was in a waistband, as the judge thought he did. Defendant simply walked away when the police arrived, while reaching inside his jacket. These acts are certainly consistent with innocent conduct and do not, standing alone, constitute a basis for an articulable suspicion of criminal conduct or otherwise corroborate an "anonymous tip" justifying a "stop and frisk." They are, standing alone, equally consistent with innocent conduct. (State v. Tysen R. Privott, March 13, 2009; Mark S. Carter, Designated Counsel)

Suppression of CDS found in **warrantless automobile search** affirmed, case remanded for reconsideration of denial of suppression of evidence found on Shaw's person. The **State made no effort to prove exigent circumstances**. Rather, consistent with the State Police 'policy' on searches, the State took the position that on any and all roadside stops, searches could be conducted without a search warrant as long as the trooper making the stop smelled marijuana in the stopped car. That is not the law. As the trial judge found, the scene of the stop was minutes away from the State Police barracks and from a service station. The troopers could have had the car towed or driven to either place, where, as the judge noted, they could have conducted a search in complete safety. Instead, they spent almost an hour tearing the car apart on the side of the Turnpike. The State failed to present evidence explaining how the troopers were faced with "exigent circumstances" making it "impracticable" to wait for a warrant before beginning the search. Also, in her very brief ruling upholding the search of Shaw's socks at the police barracks, as a search incident to arrest, the trial judge did not address Shaw's contention that the arrest itself was invalid. Because the trial judge did not address the legality of Shaw's arrest, and because there may be other grounds justifying the arrest, this issue was remanded to the trial court for reconsideration of Shaw's suppression motion respecting the contraband found in his socks. (State v. Vernett Shaw and Paul Green, March 19, 2009; Robert L. Sloan, A.D.P.D.)

SENTENCING - MISCELLANEOUS

The Appellate Division affirmed defendant's convictions, but remanded the case for reconsideration of sentence in light of defendant's argument that his sentence was **disparate with his codefendant's sentence**. Villegas pleaded guilty to first-degree armed robbery, and the court sentenced him as a second-degree offender, imposing a five-year prison term. Defendant, also convicted of first-degree armed robbery, received an eighteen-year prison term. Defendant argued that Villegas should have received the greater sentence because he actually committed the crime; defendant, on the other hand, left the store before Villegas pointed the gun at the cashier, robbed the cash register, made the cashier lie on the ground, and removed money from his pockets. The judge failed to mention Villegas's sentence when imposing the sentence upon defendant. The court also failed to compare the prior criminal records of both defendant and codefendant. The court did not consider the testimony that showed that defendant left the liquor store and Villegas unilaterally determined to complete the robbery on his own. Although Villegas's cooperation with law enforcement authorities is a factor to be considered, an examination of all of these factors was necessary to determine whether the sentence imposed upon defendant was justified. In the absence of that analysis, the case was remanded for further consideration of defendant's sentence. (State v. James C. Marlin, January 7, 2009; Margaret M. Mahon, Designated Counsel)
<http://www.judiciary.state.nj.us/opinions/a4791-06.pdf>

Sentence affirmed, but case remanded by the Appellate Division for entry of an order **redacting from the presentence investigation report certain portions of the two-page addendum to the victim-impact statement** written by defendant's former spouse, Eneida Sosa. As the guardian of the victim, a mentally incompetent person, and as the grandmother of the tender-years witness to the crime, Eneida could speak in loco parentis on their behalf and complete a victim-impact

statement for them. However, the letter goes well beyond an impact statement when Eneida communicates double and triple hearsay respecting alleged sexual offenses of which she had no personal knowledge and which were never the subject of any criminal investigations or charges, much less any prior convictions. Clearly, the objectionable portion of Eneida's statement could never support the exercise of discretion respecting sentencing. Neither can it in the future support the exercise of discretion by the Parole Board. As a consequence, the letter should have been redacted to remove the statements respecting other crimes prior to sentencing. (State v. Bernardo Sosa, February 4, 2009; Frank J. Pugliese, A.D.P.D.)

Conviction affirmed, remanded for re-sentencing by the Appellate Division. In making his findings, the trial judge found aggravating factor N.J.S.A. 2C:44-1a(2) [“gravity and seriousness of harm inflicted on the victim”] because defendant participated in a “rather vicious, unprovoked attack on an older man.” While this may have been the court's assessment of the injuries sustained by the victim, defendant was convicted of third-degree aggravated assault based on having inflicted “significant bodily injury.” N.J.S.A. 2C:11-1d defines significant bodily injury as “bodily injury which creates a temporary loss of the function of any bodily member or organ or temporary loss of any one of the five senses.”

Based on the jury's verdict, there was no factual support for the court's characterization of the injuries. Finally, although at age forty-eight, Jenkins was twenty-nine years older than defendant, this age disparity alone did not make the victim “particularly vulnerable or incapable of resistance due to advanced age.” N.J.S.A. 2C:44-1a(2). **The consideration of an inappropriate aggravating factor by the trial court required that the sentence be vacated**, and the matter remanded for re-sentencing. (State v. John White, April 21, 2009; Shara Saget, A.D.P.D.)